ORIGINAL

RECEIVED

APR - 5 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Starpower Communications, LLC	)	
Pursuant to Section 252(e)(5) of the	)	
Communications Act for Preemption of the	)	CC Docket No. 00-52
Jurisdiction of the Virginia State Corporation	)	
Commission Regarding Interconnection	)	
Disputes with Bell Atlantic-Virginia, Inc.	)	
And GTE South, Incorporated	)	
	)	

DOCKET FILE COPY ORIGINAL

COMMENTS OF MCI WORLDCOM, INC.

Lisa B. Smith
Matthew B. Pachman
Mark B. Ehrlich
MCI WorldCom, Inc.
1801 Pennsylvania Ave, N.W.
Washington, D.C. 20006
(202) 887-2992

Dated: April 5, 2000

No. of Copies rec'd 0+6
List ABCDE

[redacted]

Table of Contents

I. Introduction 1

II. The Virginia Commission Has Failed to Act 1

III. The FCC Has Asserted Its Intention to Exercise Jurisdiction If a State Commission Refuses to Enforce an Interconnection Agreement 3

IV. The Telecommunications Act of 1996 Requires the Commission to Conduct Interconnection Agreement Enforcement Proceedings If a State Commission Refuses to Do So 4

A. Any Other Interpretation of the Commission's Enforcement Authority Would Be Arbitrary and Unreasonable 5

B. The Commission's Pronouncements Regarding Section 252(e)(5) Do Not Prohibit the Commission from Taking In This Matter 7

V. Even in the Absence of a Statutory Directive, Sound Public Policy Suggests that the Commission Should Enforce Interconnection Agreements Particularly When State Commissions Refuse to Do So 9

VI. Conclusion 13

I. Introduction and Summary:

MCI WorldCom, Inc. ("MCI WorldCom" hereby files its comments in response to the above-captioned Petition.

Starpower Communications, LLC ("Starpower" or "Petitioner") presents a relatively simple issue that can be readily resolved, *viz.*, to which tribunal should an aggrieved party turn to enforce the terms of an interconnection agreement, when a state public utility commission has expressly refused to enforce the terms of an interconnection. Petitioner has asserted that the Federal Communications Commission ("FCC" or the "Commission") via section 252(e)(5) of the Telecommunications Act of 1996 (the "Act") is the appropriate agency for resolving such a matter. MCI WorldCom supports Starpower's petition.

The Virginia State Corporation Commission (the "Virginia Commission") expressly refused to take action on matters filed by Starpower requiring enforcement of interconnection agreements approved under section 252 of the Act. As a result, Petitioner correctly asks this Commission to recognize that the Virginia Commission has failed to carrier out its responsibilities under the Act and to assert jurisdiction over the matters at issue in accordance with section 252(e)(5) of the Act. We believe that the Commission, in order to satisfy the requirements of the Act and to ensure sound public policy with respect to the enforcement of interconnection agreements, must exercise its jurisdiction in this instance.

II. The Virginia Commission Has Failed to Act.

The Virginia Commission has explicitly refused to administer the Telecommunications Act's provisions with respect to Starpower's complaint and petition filed against Bell-Atlantic-Virginia and GTE-South, Inc., respectively, with the Virginia

Commission.[1] In other cases, this Commission has merely been confronted with the question of whether a state commission's alleged failure to take action has risen to the level where the Commission could exercise jurisdiction pursuant to section 252(e)(5).[2] Here, unlike the other scenarios reviewed by this Commission, the Virginia Commission has unequivocally determined not to take action on Starpower's Complaints stating "[W]e find we should take no action on the petitions."[3] Although the Virginia Commission considered the pleadings, it ultimately concluded that it should not act because the federal government has not set sufficiently clear standards in this area. Moreover, the Virginia Commission made its refusal to resolve the issues presented in the enforcement proceedings in favor of the FCC abundantly clear. *Starpower/Cox Order* at 7 ("We will dismiss these petitions without prejudice but encourage the parties to carry their requests for construction of these agreements to the FCC . . ..."). As a result of these statements, the Virginia Commission's failure to render a finding with respect to its

---

[1] Complaint of Starpower Communications, LLC Against Bell Atlantic-Virginia, Inc. for Breach of Interconnection Agreement dated July 19, 1999; Petition of Starpower Communications, LLC for Declaratory Judgement Interpreting Interconnection Agreement with GTE-South, Inc. dated February 3, 1999. (Referred to collectively herein as the "Complaints").

[2] See, e.g., Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc., CC Docket No. 99-198, Memorandum Opinion and Order, DA 99-1552 (Comm. Carr. Bur. Released Aug. 5, 1999.) ("Global NAPs Decision").

[3] See Petition of Starpower Communications, LLC, For Declaratory Judgment Interpreting Interconnection Agreement with GTE South, Inc., and Petition of Cox Virginia Telecom, Inc. v. GTE South Incorporated, For enforcement of interconnection agreement for reciprocal compensation for the termination of local calls to Internet Service Providers, Case Nos. PUC990023 and PUC990046, Final Order (Jan. 24, 2000) ("*Starpower/Cox Order*") at 7.

interpretation of the interconnection must be deemed a clear failure to act upon Starpower's petition pursuant to section 252(e)(5) of the Act. [4]

III. The FCC Has Asserted Its Intention to Exercise Jurisdiction If a State Commission Refuses to Enforce an Interconnection Agreement.

In briefs filed in the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Eighth Circuit, the Commission clearly stated that the agency would have asserted jurisdiction over the relevant enforcement proceedings had a state commission chosen not to do so. Specifically, the Commission's briefs in both the Fourth and the Eighth Circuits stated:

> The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, setting the terms and conditions for those agreements (subject to the standards set forth in the Act and in FCC regulations), and exercising *review and enforcement authority*. A state may choose whether to assume regulatory responsibility; if it elects not to do so, the FCC will perform that role under the statute.[5]

---

[4] MCI WorldCom notes that in cases where a state commission has explicitly declined to exercise jurisdiction pursuant to section 252 of the Act, the Commission should take jurisdiction over the proceedings immediately. Section 252(e)(5) states that the Commission shall take jurisdiction "within 90 days after being notified (or taking notice) of such failure [to act]." Where a state commission has clearly refused to act, there is no reason to trigger a requirement for notice and comment to determine whether the Commission should assert jurisdiction over the relevant matter. Instead, we believe that Starpower would have been within its rights under section 252(e)(5) to invoke jurisdiction by simply filing a section 208 complaint once the Virginia Commission issued its Starpower/Cox order. See, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order,11 FCC Rcd 15499, ¶ 127 (1996) ("*Local Competition Order*").

[5] Brief for the United States as Intervenor-Appellant at 5, Bell Atlantic-Maryland, Inc. v. MCI WorldCom, Inc., (4th Cir.) (No. 99-2459) (emphasis added); Brief for the United States and the Federal Communications Commission as Intervenors at 5, Southwestern Bell Telephone Co. v. Connect Communications Corp., (8th Cir.) (No. 99-3952) (emphasis added).

These unequivocal statements to the federal courts of appeal resolve the issue of the Commission's exercise of jurisdiction should a state commission decline to take action to enforce the terms of an interconnection agreement. Indeed, they are also consistent with the Commission's finding that it is authorized and will enforce the terms of interconnection agreements directly through its section 208 complaint process.[6]

IV. The Telecommunications Act of 1996 Requires the Commission to Conduct Interconnection Agreement Enforcement Proceedings if a State Commission Refuses to Do So.

MCI WorldCom contends that the position taken by the Commission in its federal court briefs is consistent with, and indeed mandated by, the plain language of the Telecommunications Act. The Act clearly directs the Commission to undertake all duties related to administering sections 251 and 252 of the Act if a state commission refuses to undertake this role. Section 252(e)(5) states:

> "If a State commission fails to act to carry out its responsibility under this section *in any proceeding or other matter under this section*, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State Commission."[7]

---

[6] See *Local Competition Order*, at ¶ 127 ("[A] party could file a section 208 complaint alleging that a common carrier is violating the terms of a negotiated or arbitrated agreement.")

[7] 47 U.S.C. § 252(e)(5) (emphasis added).

Clearly, Congress mandated that the Commission's duty to assert jurisdiction for a state commission's failure to act extends beyond mediation and arbitration proceedings. The Commission bears this responsibility for any section 251 or 252 proceeding.[8]

It is noteworthy that the phrase "in any proceeding or other matter under this section" makes no distinction between the mediation/arbitration of interconnection agreements and the later enforcement/interpretation of provisions therein. Both categories of determinations are, in every practical sense, made "under" section 252; the key provision granting state commissions the authority to act in these instances. As the Eighth Circuit explained: "[T]he power to approve or reject these agreements based on the FCC's requirements includes the power to enforce those requirements."[9]

(A) Any Other Interpretation of the Commission's Enforcement Authority Would Be Arbitrary and Unreasonable

The Commission's failure to preempt the Virginia Commission pursuant to section 252(e)(5) for its refusal to act would produce arbitrary results in the enforcement arena and would significantly impair a new entrant's ability to enter the marketplace. It is undisputed that a state's refusal to arbitrate whether a requesting carrier is entitled to certain terms in its interconnection agreement, triggers preemption by the FCC under section 252(e)(5). Indeed, a carrier might ask a state commission to interpret or enforce those same terms during performance of the interconnection agreement. The notion that section 252(e)(5) preemption by the Commission would be applicable to the first scenario

[8] This Commission has already recognized that with respect to the mediation and arbitration provisions of section 252 of the Act, it will exercise jurisdiction should a state commission determine not to or fails to perform these tasks. See, *Local Competition Order,* ¶ 1285.

[9] Iowa Utils. Bd. v. FCC, 120 F.3d 753, 804 (8th Cir. 1997), aff'd in part and rev'd in part on other grounds sub nom. AT&T Corp., 119 S. Ct. 721.

but not the second would mean that a carrier's remedy under section 252(e)(5) depends not on the substance of the claim, but solely on the *timing* of the carrier's request. This cannot be what Congress intended.

The language of section 252(e)(6) of the Act supports this position. Congress unequivocally stated that "[i]n a case where a State fails to act as described in [section 252(e)(5)], the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be *the exclusive remedies* for a State commission's failure to act." 47 U.S.C. § 252(e)(6) (emphasis added). Congress thus directed the Commission to serve as an alternative forum for enforcement proceedings where a state fails to carrier out its responsibilities under section 252 of the Act.

When Congress wanted to limit agency duties under the Act to situations in which an agency acts to approve or reject an interconnection agreement, it knew how to do so. For example, section 252(e)(4) expressly prohibits state court review of "the action of a state commission in *approving* or *rejecting* an agreement." 47 U.S.C. § 252(e)(4) (emphasis added). By contrast, Congress did not limit the terms of section 252(e)(5) to "the action of a state commission in approving or rejecting an agreement." Rather, it used broad language conferring upon the Commission the mandate to act "in *any* proceeding or other matter" where a state commission fails to act. In construing section 252(e)(5), the Commission should effect the intent of Congress.[10]

[10] Section 252(e)(5) confers rights where a State fails to act "in any proceeding or other matter under this section." Congress used almost identical language in section 252(e)(6) to confer federal court jurisdiction "[i]n any case in which a State commission makes a determination under this section." Every federal court that has construed similar language set forth in section 252(e)(6) has agreed that it encompasses state commission enforcement/interpretation determinations in addition to mediation/arbitration determinations. See Southwestern Bell Tel. Co. v. Public Utility Commission of Texas,

(B) The Commission's Pronouncements Regarding Section 252(e)(5) Do Not Prohibit the Commission from Taking Action In This Matter

The Commission's existing statements regarding its role under section 252(e)(5) in no way undercut this conclusion. The Commission's most recent discussion of section 252(e)(5) appears in its order in Global NAPs. In that case, however, the Commission noted that the state PUC had, in fact, taken action, and thus deemed section 252(e)(5) inapplicable.[11] The instant situation is quite different.

Similarly, the provisions of the Commission's *Local Competition Order* implementing section 252(e)(5) fail to speak directly to the instant matter. The Commission stated that it would limit its actions under section 252(e)(5) to "instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C)." *Local Competition Order* at ¶ 1285. However, in seeking comment on section 252(e)(5), the Commission was not concerned with the type of proceeding (e.g., arbitration versus enforcement), but rather was focused on what constituted a failure of a state commission "to carry out its responsibilities". In addressing this issue, the

---

No. 98-50787, slip op. at __ (5th Cir. March 30, 2000); Illinois Bell Tel. Co. v. WorldCom Technologies, 179 F.3d 566, 570-71 (7th Cir. 1999), modified, No. 98-3150 slip op. (Aug. 19, 1999); Iowa Utils. Bd., 120 F.3d at 804 n.24; BellSouth Telecommunications v. Brooks Fiber Communications, Nos. 3:98-0811, slip op. at 2 (M.D. Tenn. Sept. 30, 1999); Southwestern Bell Tel. Co. v. Brooks Fiber Communications, No. 98 CV 468 K(J), slip op. at 2 (N.D. Okla. Sept 20, 1999); Bell Atlantic-Virginia v. WorldCom Technologies, No. 99-275-A, slip op. at 13 (E.D. Va. July 1, 1999); BellSouth Telecommunications v. MCImetro Access Transmission Servs., No. 3:99CV97-MU, 1999 U.S. Dist. LEXIS 12783, at *8-9 (W.D.N.C. May 20, 1999); Michigan Bell Tel. Co. v. MFS Intelenet, 16 F. Supp. 2d 817, 823-24 (W.D. Mich. 1998); Illinois Bell Tel. Co. v. WorldCom Technologies, No. 98 C 1925, 1998 WL 547278, at *3 (N.D. Ill. Aug. 27, 1998), aff'd, 179 F.3d 566 (7th Cir. 1999).

[11] See Global NAPS Decision, ¶ 7.

Commission and commenters assumed that a state commission's failure to act would only be made at the arbitration or mediation phase of the interconnection agreement process. Perhaps this is because it is eminently reasonable to assume that a state commission that has acted to arbitrate, mediate and then approve an interconnection agreement would also enforce the provisions therein—an assumption proven to be incorrect by the instant case. Yet, the absence of any discussion with regard to the procedural situation presented by Starpower demonstrates that the Commission, as well as the commenters in that proceeding, had little reason to believe that a state that arbitrated and then approved an agreement would refuse to enforce it. Equally compelling is the fact that a Commission decision to act under section 252(e)(5) for purposes of arbitration, mediation or approval of an interconnection agreement would necessarily qualify it to enforce the very provisions that it acted on in the first instance.

Moreover, the *Local Competition Order* makes no attempt to interpret the scope of section 252(e)(5)'s expansive language requiring the Commission to assume responsibility when a state commission fails to act "in any proceeding or other matter". The absence of any discussion on this point indicates that the Commission did not consider it, and leads to the conclusion that the limiting language in ¶ 1285 was not the Commission's way of consciously carving out enforcement proceedings from the Commissions 252(e)(5) jurisdiction when it rendered its opinion in the *Local Competition Order*.

The text of 47 C.F.R. § 51.801, the Commission's rule implementing section 252(e)(5), is consistent with this view. Section 51.801(a) speaks generically about the appropriate times for the Commission to act under section 252(e)(5). Nothing in the rule

precludes the application of the section to enforcement/interpretation actions. Despite the fact that Section 51.801(b) states that "[f]or purposes of this part, a state commission fails to act if the state commission fails to respond" to a request for mediation or arbitration, given the statutory text described above, section 51.801(b) should not, and need not, be interpreted as limiting the remedial aspects of section 252(e)(5). Rather, it should be read as an interpretation for one set of circumstances for which the "failure to act" language of the statute is applicable.[12] In sum, there is no limiting language in either the Act or the Commission's rules that precludes the Commission from acting with respect to enforcement of interconnection agreements when a state commission refuses to do so.

V. Even in the Absence of a Statutory Directive, Sound Public Policy Suggests that the Commission Should Enforce Interconnection Agreements Particularly When State Commissions Refuse to Do So.

Congress's decision in this regard has strong public policy underpinnings. The Supreme Court has recognized that a fundamental principle of American law is that a right cannot exist without a corresponding remedy. See Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 66 (1992); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."). It is

[12] In a footnote in its Global Naps Decision, the Commission suggested that the text of its current regulation implementing section 252(e)(5) limits the instances under which the Commission will step in for a state commission to scenarios involving arbitration and mediation. Global Naps Decision at ¶5 n.11. This footnote, however, was clearly not the Commission's final word on this subject, as the main text of that order states that the Commission was not deciding the issue of whether 252(e)(5) should apply to enforcement proceedings. Id., ¶ 7.

undisputed that the Act grants competitive local exchange carriers ("CLECs") the right to enter into interconnection agreements with incumbent local exchange carriers ("ILECs"), and to seek enforcement of the terms of those agreements. Accordingly, a forum must exist that will provide for such enforcement.

Like the federal courts, Congress and this Commission have recognized that parties should have the right to enforce the terms of interconnection agreements. By the same token, there can be no doubt that state public utility commissions, while empowered to do so, are not obligated to undertake this task. Rather, state commissions have been given the option to participate in administering the requirements of sections 251 and 252 of the Act.[13] Any other reading of the statute would arguably violate the Tenth Amendment to the Constitution.[14]

Since state commissions are not obligated to administer the terms of the Act, some other tribunal must exist to allow parties to vindicate their statutory rights. Even leaving aside the text of sections 252(e)(5) and 252(e)(6), an analysis of the available options clearly dictates that the Commission should assert jurisdiction when a state commission refuses to enforce the terms of an interconnection agreement.

The possible fora, other than state public utility commissions, which are generally available to resolve disputes between telecommunications carriers, include (1) this Commission, (2) state courts, (3) federal courts and (4) alternative dispute resolution ("ADR") organizations. These options will be addressed in reverse order.

---

[13] See 47 U.S.C. § 252(e)(5); Michigan Bell Telephone Co. v. Climax Telephone Co., 202 F.3d 862, 868 (6th Cir. 1999).

[14] See, e.g., Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc., 452 U.S. 264 (1981).

Although parties are generally free to include ADR provisions in commercial agreements, there is clearly no statutory or other legal requirement mandating the inclusion of such clauses in interconnection agreements. Thus, the statutory right of a CLEC to enter into and seek enforcement of the terms of an interconnection agreement cannot be made contingent on the existence of an ADR provision between the parties. Some governmental dispute resolution forum must be available.

Initiation of enforcement actions in the federal courts does not appear to be a viable option. Although interconnection agreement enforcement actions may present "federal questions" for jurisdictional purposes, the only private right of action to enforce the provisions of section 251 and 252 of the Telecommunications Act is contained in section 252(e)(6). That provision, however, allows for federal court action only after a state commission or the FCC conducts an initial proceeding.[15] Thus, while several courts have ruled that federal district courts should hear appeals of such enforcement determinations, the federal district courts simply cannot take the place of recalcitrant state commissions. Even if a federal court could hear such enforcement action in the first instance, however, they may lack necessary expertise to decide certain factual issues.

Although section 252(e)(4) deprives state courts of "jurisdiction to review the action of a State commission in approving or rejecting an [interconnection] agreement," one could argue that this prohibition might not apply to enforcement actions. Thus, putting aside the restrictions of the first sentence of section 252(e)(6), state courts could ostensibly enforce interconnection agreements under traditional principles of state

[15] Bell Atlantic-Virginia, Inc. v. WorldCom Technologies of Virginia, Inc., 70 F. Supp.2d 620, 626 (E.D. Va. 1999); Indiana Bell Telephone Company, Inc. v. McCarty, 30 F. Supp.2d 1100, 1104 (S.D. Ind. 1998).

contract law. Such a result, however, would be at odds with Congress's wishes. As noted above, courts may not be the optimum forum for enforcing interconnection agreements because they may lack the necessary expertise to decide certain factual issues in the first instance. This problem is exacerbated where state courts are concerned, as they would be called on to apply principles of federal law in the context of a state law contract action. While state courts may certainly decide issues of federal law, at a minimum Congress has indicated a preference for federal courts to rule on interconnection issues.[16] This leaves the Commission as the only logical choice for resolution of these disputes in instances where a state has either refused, as is the case with the Starpower matter, or failed to act in the context of an enforcement action. Unlike state courts, this Commission possesses the necessary technical expertise to handle complicated factual issues. Moreover, action by the Commission would allow for further judicial review in the federal courts of appeal. Indeed, FCC action on enforcement matters would help to foster uniform national decision-making, a clear congressional goal.

Even assuming *arguendo* that the statute did not mandate that the Commission assert jurisdiction where a state refuses to enforce interconnection agreements, there is certainly nothing in the statute that affirmatively prevents the Commission from assuming this role. Indeed, the Commission has already stated that it will enforce the terms of interconnection agreements through the section 208 complaint process.[17] In

---

[16] See 47 U.S.C. §§ 252(e)(4), 252(e)(6); Illinois Bell Telephone Co. v. WorldCom Technologies, Inc., 179 F.3d 566, 570-71 (7th Cir. 1999) (Congress contemplated federal court review of state commission decisions in enforcement actions).

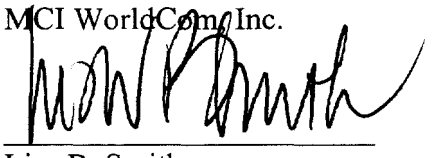
[17] *Local Competition Order*, at ¶ 127; see also supra, note 2.

light of this fact, there is no reason why a complaining carrier should be left without a remedy simply because it chose to file with a state commission and was turned away.

VI. Conclusion

MCI WorldCom supports Starpower's petition for preemption under section 252(e)(5). This Commission has statutory authorization, pursuant to section 252(e)(5), to preempt and then take action with regard to any proceedings under section 252 when a state fails to act. There is no question, based on the Starpower/Cox Order that the Virginia Commission has failed to act. Indeed, it definitively stated that it would not resolve the merits of Starpower's claims. Therefore, unless this Commission preempts the Virginia State Commission and entertains Starpower's Complaints, Starpower will suffer further damages and its efforts to effect a remedy will be stifled.

Respectfully submitted,
MCI WorldCom, Inc.



Dated: April 5, 2000

Lisa B. Smith
Matthew B. Pachman
Mark B. Ehrlich
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 887-2992

CERTIFICATE OF SERVICE

I, Lonzena Rogers, do hereby certify, that on this fifth day of April 2000, I have caused a true and correct copy of MCI WorldCom, Inc.'s Comments in the matter of Starpower CC Docket 00-52 on the following:

Magalie Roman Salas *
Secretary
Federal Communications Commission
445 Twelfth Street, SW
TW-A325
Washington, DC 20554

Janice M. Myles *
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 5-C327
Washington, DC 20554

Russell M. Blau
Michael L. Shor
Swidler, Berlin, Shereff & Friedman, LLP
300 K Street, NW
Suite 300
Washington, DC 20007

ITS, Inc. *
445 Twelfth Street, SW
CY-A257
Washington, DC 20554


Lonzena Rogers

* Hand Delivery